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VIA OVERNIGHT MAIL

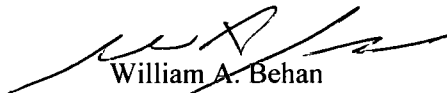
Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
Office of the Executive Secretary
1099 14th Street, N.W.
Washington, D.C. 20570

Re: WKYC-TV, Inc. Case No. 8-CA-39190

Dear Mr. Heltzer:

Attached for filing are the original and eight (8) copies of Respondent WKYC-TV's Answering Brief to Exceptions of General Counsel and Charging Party in the above-captioned matter.

Very truly yours,



William A. Behan

WAB/mlb
Enclosures

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ORDER SECTION

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

WKYC-TV, INC.

and

CASE NO. 8-CA-39190

**NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES AND TECHNICIANS, LOCAL 42
a/w COMMUNICATION WORKERS OF AMERICA, AFL-CIO**

**RESPONDENT WKYC-TV, INC.'S ANSWERING BRIEF
TO EXCEPTIONS OF GENERAL COUNSEL AND CHARGING PARTY**

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Respondent WKYC-TV, Inc., pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, submits its Answering Brief to the Exceptions filed by General Counsel and Charging Party, National Association of Broadcast Employees and Technicians, Local 42 a/w Communication Workers of America, AFL-CIO (NABET).

STATEMENT OF THE CASE

WKYC-TV ceased dues checkoff following termination of a collective bargaining agreement, a lawful impasse in negotiations, and the subsequent posting of conditions. The Administrative Law Judge concluded that WKYC-TV's actions were lawful under Board law that has been in effect for half a century. The existing law privileges the cessation of checkoff at any time following contract termination. Beginning with its 1962 decision in Bethlehem Steel, 136 NLRB 1500 (1962) and continuing to the present, the Board has consistently affirmed the right of employers to cease dues checkoff following contract expiration. The Board has reaffirmed this rule several times over the past 50 years, most recently in Hacienda Hotel, Inc., (Hacienda III), 355 NLRB No. 154 (2010).

General Counsel seeks to establish a new standard prohibiting the cessation of checkoff following contract expiration and to penalize WKYC-TV under this new standard. The only way the Board may find a violation here would, as General Counsel concedes, require reversal of Bethlehem Steel and its progeny and the adoption of a new standard. The Board should uphold the current law because it is based on the statutory provisions that govern dues checkoff and union security, namely Section 7, Section 8(a)(3), and Section 302(c)(4). The NLRA's policies regarding freedom of contract and economic power also require that the Board uphold the current law. Even if the Board were inclined to ignore its precedent and adopt General Counsel's proposed standard, the new standard cannot apply retroactively to WKYC-TV in this case.

PROCEDURAL HISTORY

NABET filed its original charge on October 18, 2010 and a first amended charge on March 28, 2011. General Counsel issued Complaint on March 30, 2011 and WKYC-TV filed its Answer on April 7, 2011. On April 5, 2011, General Counsel filed a First Amended Complaint and WKYC-TV filed a First Amended Answer on April 8, 2011.

On August 18, 2011, the parties filed a Joint Motion and Stipulation of Facts requesting that Administrative Law Judge Jeffrey D. Wedekind issue a decision without hearing based on a stipulated record. On August 19, 2011, the ALJ issued an Order Granting Joint Motion, Approving Stipulation, and Setting Time for Filing Briefs. The parties subsequently filed briefs with the ALJ.

On September 30, 2011, Judge Wedekind issued his Decision dismissing the Complaint and issued an Order Transferring Proceeding to the Board. On October 27, 2011, NABET filed Exceptions to the ALJ's Decision. On October 31, 2011, General Counsel also filed Exceptions. General Counsel and NABET's Exceptions attack the ALJ's conclusion that WKYC-TV lawfully ceased dues checkoff following contract termination.

On November 11, 2011, WKYC-TV filed Cross-Exceptions to the ALJ's Decision. WKYC-TV's Cross-Exceptions are limited to the ALJ's ruling on the Section 10(b) defense.

FACTUAL BACKGROUND

The facts of this case are straight-forward. WKYC-TV and NABET were parties to a collective bargaining agreement with a term of June 1, 2006 to June 1, 2011.¹ The agreement included a union security clause and a dues checkoff provision.² On June 1, 2009, the agreement

¹ Stipulated Record 16, Exhibit I. The stipulated record is hereinafter referred to as "S.R." Exhibits included in the stipulated record are hereinafter referred to as "Ex."

² The dues checkoff provision is set forth in Article II of the terminated contract. S.R. 16, 18, Ex. 1.

terminated pursuant to a reopener provision.³ From April 2009 to October 2009, the parties engaged in good-faith negotiations for a successor agreement.⁴ During negotiations neither party proposed changes to the dues checkoff provision of the terminated contract.⁵

On October 20, 2009, WKYC-TV presented its final offer.⁶ WKYC-TV's final offer included continuation of the pre-existing dues checkoff provision.⁷ NABET rejected the final offer on December 5, 2009.⁸ This rejection brought the parties to impasse.⁹ On January 4, 2010, WKYC-TV posted terms and conditions implementing portions of its final offer.¹⁰ The posted conditions do not include either the union security clause or dues checkoff.¹¹

In Case No. 8-CA-38736, filed on January 5, 2010, NABET alleged that impasse was improper and that WKYC-TV could not post conditions in the context of impasse reached during reopener negotiations.¹² On June 18, 2010, Region 8 concluded that the parties were validly at impasse and that WKYC-TV could lawfully post conditions following an impasse in reopener negotiations and dismissed NABET's charge.¹³ NABET's appeal of the dismissal was subsequently denied.¹⁴

In late September 2010, WKYC-TV's General Manager Brooke Sectorsky discovered that dues checkoff had inadvertently continued despite the checkoff clause not being a posted condition and instructed that checkoff cease.¹⁵ On October 5 and 6, 2010, WKYC-TV notified NABET and employees, respectively, that it would discontinue dues checkoff effective

³ S.R. 16, 19.

⁴ S.R. 20.

⁵ S.R. 21, 34.

⁶ S.R. 22.

⁷ S.R. 24, Ex. J.

⁸ S.R. 23.

⁹ S.R. 25.

¹⁰ Id.

¹¹ S.R. 26.

¹² S.R. 27, Ex. N, O, P, Q.

¹³ Id.

¹⁴ Id.

¹⁵ S.R. 29.

immediately.¹⁶ On October 6, 2010, WKYC-TV ceased checkoff and has not deducted dues from employees' paychecks since that date.¹⁷ Following cessation of checkoff, the amount of money that previously was deducted as dues was added to the pay of employees.¹⁸ WKYC-TV did not retain this money.¹⁹

NABET has at various times during the course of negotiations, through the period of impasse and posted conditions and continuing through the present, engaged in activity directed at the general public, the viewing audience, and WKYC-TV's advertisers.²⁰ NABET's activity included picketing at WKYC-TV, at events sponsored by WKYC-TV, and at the locations of WKYC-TV's advertisers.²¹ This activity was designed to negatively impact WKYC-TV's business and influence its position on contract issues.

ARGUMENT

A. The ALJ Correctly Concluded that WKYC-TV's Cessation of Dues Checkoff Was Lawful.

The ALJ concluded that WKYC-TV ceased dues checkoff following contract termination consistent with Board law.²² Under Board law dues checkoff is an established exception to the unilateral change doctrine of NLRB v. Katz, 369 U.S. 736 (1962). Dues checkoff is not a term or condition of employment that must be maintained as part of the status quo and an employer has the right to cease dues checkoff at any time following expiration or termination of a collective bargaining agreement. Bethlehem Steel Co., 136 NLRB 1500 (1962). This has been the state of the law for half a century. See e.g., Hacienda Hotel Resort and Casino (Hacienda

¹⁶ S.R. 30, 31, Ex. R, S.

¹⁷ S.R. 32.

¹⁸ S.R. 33.

¹⁹ Id.

²⁰ S.R. 36.

²¹ Id.

²² Decision, p. 4.

III), 355 NLRB No. 154 (2010); Quality House of Graphics, Inc., 336 NLRB 497 (2001); West Co., 333 NLRB 1314 (2001); 87-10 51st Ave. Owners Corp., 320 NLRB 993 (1996); and Indiana and Michigan Electric Co., 284 NLRB 53 (1986). The United States Supreme Court has acknowledged that the Board exempts dues checkoff from the Katz rule. See Litton Financial v. NLRB, 501 U.S. 190 (1991).

The Board itself has acknowledged the state of the law before the Court of Appeals for the Ninth Circuit in Hacienda III. The Board's brief to the Ninth Circuit in that case acknowledged that "it is undisputed that the Board has for decades held that an employer does not violate the Act by unilaterally discontinuing checkoff after the parties' CBA expires" and "there is no dispute that existing Board precedent, if applied, would require the Board to dismiss the complaint, which alleges that the Companies violated the Act by discontinuing dues checkoff after the parties' CBA expired." LJEB, 2011 U.S. 9th Cir. Briefs LEXIS 10 at 17-18.

The Ninth Circuit, after 15 years of litigation, recently set aside the Board's Hacienda III decision. Local Joint Exec. Bd. of Las Vegas v. NLRB, 2011 U.S. App. LEXIS 18851 (9th Cir. Sept. 13, 2011). The Ninth Circuit's opinion compels dismissal of the instant Complaint. The Ninth Circuit noted the distinction between right-to-work and non right-to-work states and concluded that Bethlehem Steel rationally permits the cessation of dues checkoff following contract expiration in non right-to-work states where the contract also contains a union security provision. Id., slip op. at 24. Ohio, where WKYC-TV is located, is a non right-to-work state, and the WKYC-TV/NABET contract included a union security clause.

The Court of Appeals for the D.C. Circuit has repeatedly held that dues checkoff does not survive contract expiration in the context of union-security. See e.g. Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1114 (D.C. Cir. 1986) and cases discussed infra.

General Counsel, in this case, concedes that WKYC-TV's cessation was lawful under Board law. In the stipulated record General Counsel conceded that "under the current precedent of Bethlehem Steel that respondent may have been privileged to cease dues checkoff."²³ In its Exceptions, General Counsel again concedes that it "recognizes that the precedent of Bethlehem Steel has been the established law for nearly 50 years."²⁴

Applying existing law to the instant case, the ALJ correctly concluded that WKYC-TV lawfully ceased checkoff. The contract terminated on June 1, 2009 and WKYC-TV ceased checkoff on October 6, 2010. The crucial fact is that the contract had already been terminated at the time WKYC-TV ceased checkoff. Based on these facts, the ALJ appropriately concluded that WKYC-TV's cessation of checkoff was lawful.²⁵

B. WKYC-TV Did Not Reestablish Dues Checkoff as a Working Condition.

NABET excepts to the ALJ's finding that WKYC-TV did not reestablish dues checkoff as a working condition. General Counsel does not except to this finding. NABET argues that WKYC-TV reestablished checkoff by continuing it for a period of time after posting conditions.

As the ALJ concluded, NABET's argument ignores the fact that in post-Bethlehem Steel cases the employers often continued checkoff for a period of time following contract termination. See Hacienda, *supra*, (employer ceased checkoff over one year after the contract expired); Quality House, *supra*, (employer ceased checkoff three months after contract expiration); West, *supra*, (same); and 87-10 51st Ave., *supra*, (employer ceased checkoff seven months after contract expiration).

The facts of Quality House and West are similar to WKYC-TV's situation. In Quality House, the parties' expired collective bargaining agreement contained dues checkoff and union

²³ S.R. 40, Ex. X.

²⁴ General Counsel's Exceptions, p. 18.

²⁵ Decision, p. 4.

security provisions. 336 NLRB 497, 505. The cessation of dues checkoff was never proposed nor discussed during negotiations and the employer's final offer did not propose the cessation of checkoff. Id. Following impasse, the employer implemented terms of its final offer and also ceased dues checkoff. Id. In West, the cessation of checkoff also was not proposed during negotiations and the employer's final offer included checkoff. 333 NLRB 1314. The employer implemented the terms of its final offer including checkoff. Id. Three months later the employer ceased checkoff. Id. Thus, in Quality House the posted conditions did not contain checkoff while in West the posted conditions included checkoff. In both cases the Board concluded that the cessation of checkoff was lawful because the collective bargaining agreement was expired. Quality House, 336 NLRB at 497 fn. 2, and 511-513; and West, 333 NLRB at 1315, fn. 6.

Here, WKYC-TV's final offer included continuation of dues checkoff, but the posted conditions did not. Based on Quality House and West, WKYC-TV's right to terminate dues checkoff after the contract terminated gave it the right to cease checkoff after the posting of conditions regardless of whether the final offer included checkoff. These cases do not require the cessation of checkoff contemporaneous with the posting of conditions, but instead privilege cessation of checkoff at any time following the posting so long as the contract is expired.

The only decision cited by NABET in support of its "reestablishment" argument is Tribune Publishing Co., 351 NLRB 196 (2007). As the ALJ concluded, the facts of Tribune are easily distinguishable. In Tribune, the collective bargaining agreement expired on November 30, 2001 and the employer ceased dues checkoff on December 19, 2001. 351 NLRB 196, 201. In March 2002, at the union's request, the employer and union agreed to allow employees to use the employer's direct deposit system for the payment of union dues. Id. at 196-197. The employer

implemented the direct deposit of union dues in April 2002 but later ceased the direct deposit in May 2002. Id.

The Board first concluded that the employer lawfully ceased checkoff after the collective bargaining agreement expired in 2001. Id. The Board then concluded that the parties' 2002 agreement for direct deposit of dues established a new term of employment and the employer could not unilaterally cease the direct deposit of dues. Id. On review, the Court of Appeals for the District of Columbia Circuit enforced the Board's holding. In doing so it reaffirmed the law that is applicable in the instant case which is that "after expiration of the agreement a company may, if it wishes, continue payroll deduction of union dues until such time as it elects to cease making the deductions." Tribune Publishing Co. v. NLRB, 564 F.3d 1330, 1334 (D.C. Cir. 2009).

The key difference between WKYC-TV's actions and the Tribune's actions is that Tribune stopped checkoff, then started a different payroll procedure and then ceased that new procedure. Tribune's agreement to start direct deposit after ceasing checkoff created a new term of employment. WKYC-TV never stopped and restarted checkoff and it did not agree to an alternate payroll deduction mechanism; its uninterrupted continuation of checkoff for a period of time following contract expiration did not reestablish checkoff.

C. The Board Should Not Overrule the Established Law Regarding Cessation of Dues Checkoff.

In their Exceptions, General Counsel and NABET argue for the reversal of the current law which privileges the cessation of dues checkoff following contract termination. General Counsel and NABET advance various arguments in support of their position. These arguments are unavailing. The Board's dues checkoff standard is supported by statutory provisions which treat dues checkoff as a creature of contract distinct from wages, hours and other terms of

employment. The Act's mandate regarding freedom of contract also supports the Board's dues checkoff standard. Finally, the Board's standard finds support in the economic policies underlying the Act, namely that parties are free to exercise economic weapons unencumbered by the Board and courts.

1. Statutory Provisions Addressing Dues Checkoff and Union-Security Agreements Support the Current Board Law.

A lawful dues checkoff arrangement requires a written collective bargaining agreement between an employer and union as well as an affected employee's written assignment. These requirements are established by Sections 8(a)(3) and 302(c)(4) of the Act. Section 8(a)(3) permits an employer and union to enter into an agreement requiring all employees in the bargaining unit to pay union dues as a condition of employment.²⁶ Section 302 prohibits employer payments to unions subject to certain enumerated exceptions. One of the exceptions, set forth in Section 302(c)(4), permits an employer to deduct union dues pursuant to an employee's written assignment.²⁷

The Developing Labor Law provides a notable explanation of the treatment of dues checkoff as a union-security device and the interplay of Sections 8(a)(3) and 302. With respect to Section 8(a)(3)'s treatment of union-security, the authors explain that "[l]ike other union security-devices, the checkoff is a product of collective bargaining."²⁸ Regarding Section

²⁶ Section 8(a)(3) states in relevant part, "nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement." 29 U.S.C. § 158(a)(3).

²⁷ The dues checkoff exception is set forth in Section 302(c)(4) which states: "(c) The provisions of this section shall not be applicable ... (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." 29 U.S.C. § 186(c)(4).

²⁸ Higgins, The Developing Labor Law (5th Edition 2006) Volume II, Chapter 26 VI, p. 2176.

302(c)(4), the authors state that “checkoff is not compulsory; even if the employer agrees to the checkoff of dues, Section 302 of the LMRA further conditions its legality upon written authorizations from individual employees.”²⁹

The argument that Sections 8(a)(3) and 302(c)(4) must be read together finds support in Board and court treatment of dues checkoff before those provisions were added to the Act. Under the Wagner Act, the Board and courts divided on whether dues checkoff was a condition of employment subject to collective bargaining. See Hughes Tool Co., v. NLRB, 147 F.2d 69, 74 (5th Cir. 1945)(concluding that dues checkoff was not a condition of employment); and M. T. Stevens & Sons Co., 68 NLRB 229, 230 (1946)(concluding that checkoff was a “proper subject of collective bargaining.”). After the passage of the Taft-Hartley amendments added Sections 8(a)(3) and 302(c)(4), the Board concluded, “we are satisfied from the legislative history of the 1947 amendments that Congress intended the bargaining obligation contained in Section 8(a)(5) should apply to the checkoff.” U.S. Gypsum Co., 94 NLRB 112, 113, fn. 7 (1951).

In Bethlehem Steel, the Board concluded that union security and dues checkoff are creatures of contract and, therefore, an employer may cease giving effect to those provisions upon contract expiration. 136 NLRB 1500, 1502. The Board noted that under Section 8(a)(3) union-security can only be made a condition of employment pursuant to a written collective bargaining agreement. The Board reasoned that the requirement of a written contract applied to dues checkoff as well because checkoff is a means to implement union-security. Id.

In its Exceptions, General Counsel argues that Bethlehem Steel and its progeny incorrectly link the written collective bargaining agreement requirement for union-security to dues checkoff. General Counsel states that Section 8(a)(3) requires a written collective bargaining agreement for union-security but not for dues checkoff. General Counsel further

²⁹ Id.

states that Section 302(c)(4) requires a written employee assignment but not a collective bargaining agreement. General Counsel accuses the Board of conflating the written requirement for union-security with the requirement of a written assignment for dues checkoff. General Counsel mischaracterizes the Board's decisions. The Board in Bethlehem Steel did not conflate Sections 8(a)(3) and 302 because the Board was addressing only the requirement of a collective bargaining agreement under 8(a)(3), not the additional requirement of a written assignment under Section 302(c)(4). The Board's point in Bethlehem Steel and its progeny regarding Section 8(a)(3) is that checkoff and union-security become conditions of employment only through a collective bargaining agreement; unlike wages, benefits, and hours which are conditions of employment independent of a contract. Id.; see also Hacienda III, supra, 355 NLRB No. 154, slip op. at 4-5 (Members Schaumber and Hayes concurring). The written assignment requirement of Section 302(c)(4) becomes operative only if there is a current collective bargaining agreement. Id.

Several Courts of Appeals have concluded that dues checkoff arrangements require a written collective bargaining agreement and a written employee assignment based on Sections 8(a)(3) and 302(c)(4). See Sullivan Bros. Printers, Inc. v. NLRB, 99 F.3d 1217, 1232 (1st Cir. 1996)(“the Labor Management Relations Act, 29 U.S.C. § 186(c)(4), permits dues checkoff arrangements only as part of a valid collective bargaining agreement.”); U.S. Can Co., v. NLRB, 984 F.2d 864, 869 (7th Cir. 1993))(“Checkoffs of dues and other payments from the employer to the union, like the enforcement of a union-security clause, depend on the existence of a real agreement with the union.”); Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245, 254-55 (D.C. Cir. 1991)(“Section 8(a)(3) of the NLRA and sections 302(a)(2) and 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. §§ 186(a)(2), 186(c)(4), permit an employer to

make payments to a union only under a dues check-off provision contained in an effective collective bargaining agreement.”); and Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1114 (D.C. Cir. 1986)(“The well established exceptions for union-shop and dues-checkoff provisions are rooted in § 8(a) (3) of the NLRA, 29 U.S.C. § 158(a) (3), and § 302(c) (4) of the Labor-Management Relations Act, 29 U.S.C. § 186(c) (4), which are understood to prohibit such practices unless they are codified in an *existing* collective-bargaining agreement.”).

The Board’s decisions in the Burns successor-employer line of cases also firmly establish checkoff clauses as tied to and dependent upon a written contract in effect between the employer and the union. Under the Burns doctrine a successor employer, while it may have an obligation to recognize and bargain with a pre-existing union, does not necessarily assume the collective bargaining agreement and its obligations. That is, of course, unless the new employer takes actions manifesting that it has accepted and adopted the pre-existent collective bargaining agreement.

Several factors have been identified by the Board as clear and convincing evidence that the preceding collective bargaining agreement has been assumed and adopted by the new employer. One of those factors is continuation of dues checkoff. According to the Board, and the enforcing Courts of Appeals, continuation of dues checkoff is clear and convincing evidence of assumption of the preceding collective bargaining agreement because, according to the Board, checkoff is strictly a creation of a written contract and cannot exist without a written effective collective bargaining agreement.

This line of cases begins in 1972 with S-H Food Service, Inc., 199 NLRB 95, n.2 (1972) wherein the Board stated,

“Checkoff, being solely a contractual obligation did not carry over as an existing term or condition of employment.”

It continues with Ekland's Sweden House Inn, Inc., 203 NLRB 413 (1973), wherein the Board cited three actions by the successor employer that were in direct reliance on the written collective bargaining agreement and evidence that the successor had accepted that previous contract. One of those was the continued checkoff of union dues. Id. at 418.

In U.S. Can Co., 305 NLRB 1127 (1992), *enfd* 984 F.2d 864 (7th Cir 1993) the Board stated,

“We agree with the judge, for the reasons set forth by her, that the Respondent by its conduct adopted and became bound to its predecessor’s contract. In this regard, we note particularly that the Respondent honored the union security and checkoff provisions of the predecessor’s contract. These are matters which are dependent on the existence of a current contract.” [Citation to S-H Food Service.]

The Seventh Circuit enforced the Board’s decision, stating,

“But U.S. Can has a problem. To keep union officials happy it deducted union dues from its employees’ checks and remitted the money to the union, as Continental had done, and enforced the union security clause of the existing agreement. Checkoff of dues and other payments from the employer to the union, like the enforcement of a union security clause, depend on the existence of a real *agreement* with the union. [Citations omitted.] Otherwise the payment of money is a subvention barred by 29 U.S.C. § 186 (a)(2), and the requirement to join the union (or pay dues to it) coerces employees in a way forbidden by 29 U.S.C. § 158 (a)(3). Having done things that are lawful only if a collective bargaining agreement is enforced, U.S. Can is in a pickle.” Id. at 869.

The same result obtained for the same reason in Rockwood Energy and Mineral Corp., 29 NLRB 1136 (1990). In its 2002 decision in Brookfield Healthcare Center, 337 NLRB 1064 (2002), the Board stated in pertinent part,

“Second, Russell’s un rebutted testimony is that the Respondent complied with all terms of the contract, which included a union

security and dues checkoff provision. Because these last provisions are entirely features of a binding contract between the employer and a union, the Board has found a successor employer's continued implementation of such provisions a basis for inferring an employer's adoption of the predecessor's contract by its conduct." Id. at 1065.

It is important to point out here that in these cases the Board uses an elevated standard of proof -- clear and convincing evidence, before finding a successor employer to have assumed a contract. See Id. at 1064 ("the Board has held that a successor employer's adoption of a predecessor's contract with a union may be inferred from conduct; however, that inference must be based on clear and convincing evidence."). Thus, when the Board refers to continuation of dues checkoff as a term that is derived exclusively from a contract in effect between the parties, it is stating that in a most emphatic way. Checkoff is not merely suggestive of or loosely related to a written contract, it is clearly and convincingly tied to a written contract.

These cases address the same question at the core of the instant case -- to wit, is a dues checkoff clause necessarily tied to a written collective bargaining agreement in effect between the parties. Although the question at its core is the same, the cessation of dues checkoff cases (such as the instant case) and the continuation of dues checkoff cases (such as the successor employer cases) are reciprocals of each other from the perspective of the union interest versus the employer interest. In the Hacienda-like cessation of dues checkoff cases, the union has an interest in positioning checkoff as a term or condition that is not contract dependent and that can exist without a written effective collective bargaining agreement. Contrast that to the successor/assumption of contract cases where the union will universally be interested in tying the checkoff clause to the written contract so that the continuation of checkoff compels the assumption of the written contract.

General Counsel in its brief makes no reference to this related issue or line of cases, nor does Charging Party. However, the two lines of cases do appear to be directly related. First, the theories of Bethlehem Steel, Hacienda, and Southwestern are all consistent with and supported by the successor-in-interest, assumption of contract cases. Secondly, if the Board in the instant case elects to overrule Bethlehem Steel and find that a written effective collective bargaining agreement is not a necessary predicate for the checkoff of union dues, then it must necessarily also overrule S-H Food Service, Inc., Ekland's Sweden House Inn, and the line of cases following.

General Counsel asserts that the Courts of Appeals have “misconstrued Section 302(c)(4) to prohibit checkoff in the absence of a current agreement between an employer and union.”³⁰ General Counsel misstates these decisions because the courts did not state that Section 302(c)(4) alone required a written collective bargaining agreement. Instead the courts based their conclusions on a combined reading of Sections 8(a)(3) and 302(c)(4). General Counsel cites Tribune, *supra*, in which the D.C. Circuit stated that 302(c)(4) did not require a written collective bargaining agreement. Tribune is not in conflict with the other appellate court decisions because Tribune was addressing 302(c)(4) alone and did not address 8(a)(3).

General Counsel also cites Board and Courts of Appeals decisions for the proposition that dues checkoff is not a union-security device but is instead an administrative convenience for the collection of dues. See Anheuser-Busch, Inc. v. International Brotherhood of Teamsters, Local 822, 584 F.2d 41, 43 (4th Cir. 1978); NLRB v. Atlanta Printing Specialties and Paper Products Union, 523 F.2d 783, 786-787 (5th Cir. 1975); and Shen-Mar Food Products, Inc., 221 NLRB

³⁰ General Counsel's Exceptions, pp. 11-12.

1329, 1330 (1976).³¹ General Counsel's argument is misguided. Each of these decisions arose in right-to-work states; in these cases checkoff could not have been an adjunct to a union security clause.³² These cases simply do not speak to the situation in the instant case where the expired agreement included a union security clause supported by the dues checkoff. Further, Anheuser-Busch and Atlanta Printing concluded that the employer could not deduct dues for two reasons -- the collective bargaining agreement had expired and the affected employees had revoked their authorizations. Id. This supports WKYC-TV's position that the employer's checkoff obligation ends when the collective bargaining agreement terminates. Finally, if checkoff is nothing more than an administrative convenience for the union, how then is checkoff a condition of employment and a mandatory subject of bargaining subject to Katz.

While the United States Supreme Court has not decided whether checkoff survives contract termination, the Court's treatment of checkoff in other cases is instructive. See Litton, supra, 501 U.S. 190 (1991); and H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). In Litton, the Court stated, "it is the Board's view that union security and dues check-off provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement." Id. at 199. The Court itself cited to Indiana and Michigan, supra, as well as Section 302(c)(4).³³ Id.

³¹ The Board itself has disagreed on whether checkoff is a mere administrative convenience or a means for an employer to provide financial assistance to a union. For example, in Hacienda II, 351 NLRB 504, 506 (2007), former Chairman Battista stated that "[a] checkoff clause is a means by which an employer provides economic assistance to a union by deducting dues from the paychecks of willing employees, and forwarding the money to the union."

³² Anheuser-Busch and Shen-Mar arose in Virginia and Atlanta Printing arose in Georgia.

³³ In Indiana & Michigan, the Board stated that "permitting unilateral abandonment of union-security and checkoff arrangements after contract expiration is based on the fact, noted in Bethlehem Steel, that '[t]he acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3).' This term and condition is thus inherently and solely a contractual matter, and an employer's refusal to enforce a union-security provision without a proper contractual basis is 'in accordance with the mandate of the Act.'" 284 NLRB at 55.

In H.K. Porter, the Court rebuffed the Board's effort to force dues checkoff upon an unwilling employer. The Board had ordered the employer to agree to the union's dues checkoff proposal. The Supreme Court reversed the Board on the grounds that the Board was "without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." 397 U.S. 99, 102. General Counsel and NABET in this case attempt to force a dues checkoff arrangement on the employer without the employer's agreement. Such a result would flout the prohibition of H.K. Porter.

The connection between dues checkoff and union-security also finds support in Supreme Court cases addressing union-security. The Court has repeatedly held that "[t]he legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." Communication Workers of America v. Beck, 487 U.S. 735, 749 (1988)(citing Radio Officers v. NLRB, 347 U.S. 17, 41 (1954)). Since union-security is limited to compelling union dues and fees, it is reasonable to conclude that a dues checkoff provision, which compels an employer's collection of dues and fees, is subject to the same requirements of Section 8(a)(3).

2. Requiring Dues Checkoff in the Absence of a Valid Collective Bargaining Agreement Would Trample Employees' Section 7 Rights.

Under Section 7 of the Act employees have the right to financially assist labor organizations as well as the right to refrain from such assistance. 29 U.S.C. § 157.³⁴ Section 7's prohibition against coerced assistance to a union allows an exception for union-security agreements under Section 8(a)(3). *Id.* As noted above, the coerced assistance permitted under

³⁴ Section 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 29 U.S.C. § 157.

Section 8(a)(3) is limited to financial support in the form of dues and fees, Beck, supra, and then only in the context of a valid union security clause. Employee rights against coerced assistance under Section 7 and 8(a)(3) are reinforced by Section 302(c)(4)'s requirement for a specific written authorization which shall not be irrevocable beyond the termination date of the collective bargaining agreement. See Hacienda III, 355 NLRB No. 154, slip op. at 5, fn. 10 (Member Schaumber concurring); and IBEW, Local No 2088, 302 NLRB 322, 328 (1991)(holding that a dues checkoff clause that made checkoff irrevocable for successive yearly periods infringed on employees' Section 7 rights to refrain from assisting a union). As the 7th Circuit stated in U.S. Can, supra, "... the requirement to join the union (or pay dues to it) coerces employees in a way forbidden by 29 U.S.C. § 158(a)(3)." 984 F.2d at 869.

NABET's real concern here is forcing WKYC-TV's employees to continue to fund NABET post-contract termination. NABET's Exceptions make plain that coercing employees is NABET's real motive. NABET complains that it is "forced to recover money through its own means. The Union has fallen thousands and thousands of dollars behind and now must chose(sic) between disciplining members, challenging their employment status, or even taking them to court."³⁵ Leaving aside whether NABET can discipline or sue its members to collect dues post-contract expiration without violating Section 8(b)(2), NABET cannot lawfully "challenge their employment status" because a union-security provision does not survive contract termination pursuant to Section 8(a)(3). 29 U.S.C. § 158(a)(3). The situation here is obvious -- some number of WKYC-TV employees have elected to not voluntarily pay dues to the Union, and the Union is using this litigation to force them to do so. Consistent with Section 7 of the Act, some employees have exercised their statutory right to refrain from assisting the

³⁵ NABET's Exceptions, p. 1.

Union, and the Union and General Counsel are attempting to coerce them to do otherwise. The employees' Section 7 rights must prevail.

General Counsel has on other occasions argued to the Board that Section 7 requires that the checkoff obligation cease upon contract termination. In its Statement of Position to the Board in Hacienda II and Hacienda III following the Ninth Circuit's remands in 2003 and 2009, General Counsel stated, "the General Counsel believes that the Section 7 analysis set forth above provides a rational basis for excepting dues-checkoff from the Katz rule, and such a finding is consistent with the longstanding view of the labor management community."³⁶

3. The NLRA's Policy of Freedom of Contract Supports the Current Dues Checkoff Standard.

The Supreme Court has stated that one of the fundamental policies of the Act is "freedom of contract." H.K. Porter, *supra*, 397 U.S. 99, 108. Consistent with the fundamental policy of freedom of contract, WKYC-TV and NABET executed the collective bargaining agreement which is now terminated. The collective bargaining agreement contained a union-security provision and a dues checkoff provision.³⁷ The union-security provision stated that employees must pay union dues and initiation fees.³⁸ The dues checkoff provision stated that these dues and initiation fees will be deducted for employees that execute a written authorization.³⁹ The written authorization stated that it was irrevocable for "a period of one (1) year from this date, or up to the termination date of the current collective bargaining agreement between WKYC-TV and NABET, whichever occurs sooner."⁴⁰ These contract provisions make clear that WKYC-TV's

³⁶ See Statement of Position of General Counsel on Remand, p. 16. (May 15, 2003 and January 12, 2009)

³⁷ S.R. 16, 18, Ex. I.

³⁸ Ex. I, Article I, pp. 2-3.

³⁹ Ex. I, Article II, pp. 3-5.

⁴⁰ Ex. I, Article II, Section 2.4, p. 4.

obligation with respect to dues checkoff was linked to the union security provision and to the existence of a current collective bargaining agreement.

Basic contract principles also require a conclusion that the dues checkoff obligation ceased when the contract terminated. The Board has held that “[i]t is axiomatic that contract negotiations occur in the context of existing law, and, therefore, a contract provision must be read in light of the law in existence at the time the agreement was negotiated.” Hacienda Resort Hotel and Casino (Hacienda I), 331 NLRB 665, 667 (2001). Here, WKYC-TV negotiated the dues checkoff and union-security provisions in the context of the existing law that checkoff does not survive contract termination. The checkoff provisions in the collective bargaining agreement tie checkoff to the existence of a current collective bargaining agreement. The dues checkoff provision mirrored existing law and the Board must interpret the provision accordingly.

4. The Economic Policies Underlying the Act Support the Board’s Dues Checkoff Standard.

In H.K. Porter, the Court held that the Board could not order an employer to agree to checkoff. The Court also stated, “[i]t cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining.” Id. at 109.

The Board has held that “[t]he Act is premised on the view that in arms-length economic relationships, there can be areas of conflict between employers and employees that, if the parties cannot reach agreement, can be resolved through a contest of economic strength in the collective-bargaining process if the employees choose to bargain collectively.” Brevard Achievement Center, Inc., 342 NLRB 982, 985 (2004). Further, “Neither party can strip the other of the benefits of the economic weapons to which each is entitled beyond the term of the

agreement.” Sheet Metal Workers’ Int’l. Assoc., Local Union No. 115. v. Alliance Mech. Corp., 2010 U.S. Dist. LEXIS 13586, 189 L.R.R.M. 3233 (2010).

The Supreme Court has held that the Board is not empowered to “pass judgment on the legitimacy of any particular economic weapon used in support of genuine negotiations.” NLRB v. Katz, *supra*, 369 U.S. 736, 747 (citing NLRB v. Insurance Agents, 361 U.S. 477 (1960)). In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that may interfere in some measure with concerted employee activities, or which in some degree discourage union membership, and yet the use of such weapons does not constitute conduct that is within the prohibition of either Sections 8(a)(1) and (3). NLRB v. Brown, 380 U.S. 278 (1965).

The Board has not forbidden the use of checkoff as a weapon, and in Hacienda III, one of the concurring opinions observed that “like strikes and lockouts, an employer’s ability to cease dues checkoff upon contract expiration has become a recognized economic weapon in the context of bargaining for a successor agreement. The ability of parties to wield such weapons is ‘part and parcel’ of the system that the Wagner and Taft-Hartley Acts envisioned.” 355 NLRB No. 154, slip op. at 5 (Members Schaumber and Hayes concurring). Chairman Liebman and Member Pearce, in their concurrence in Hacienda III agreed, stating, “[t]o strip employers of that [weapon] would significantly alter the playing field that labor and management have come to know and expect.” *Id.* at 3.

In the instant case, after contract termination, NABET engaged in coercive activity including picketing at WKYC-TV, at events sponsored by WKYC-TV, and at the locations of WKYC-TV’s advertisers. This conduct was designed to damage the business of WKYC-TV and influence its position in negotiations. Under current law, WKYC-TV was not required to use its

payroll system to fund the Union's activities. NABET recognizes that cessation of checkoff is an economic weapon but complains that WKYC-TV used it as a "nuclear weapon".⁴¹ NABET's complaint that the weapon used by WKYC-TV was somehow excessive, contradicts the Supreme Court's admonishment that the Board may not pass judgment on a parties' choice of economic weapons. The Act does not establish the Board "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." NLRB v. Insurance Agents, 361 U.S. at 497.

The NLRA is designed to maintain a balance in labor relations. Respondent's position is straight forward. A union can engage in coercive activity, as NABET has done here, but employers should not be required to collect and remit dues to the union to fund this activity. Reversal of Bethlehem Steel would be inherently unfair because it would force an employer to collect money to fund union activities that are harmful to the company.

D. Stare Decisis Requires that the Board Uphold Bethlehem Steel.

The doctrine of stare decisis requires that once a question of law is decided by a court or administrative agency, the decision forms a precedent that should be followed in subsequent cases. Stare decisis should be a consideration for the Board in all cases applying Board precedent because "there are values that are inherent in the doctrine of stare decisis. These values include stability, predictability, and certainty of the law. In the context of labor relations law, these values are outweighed only upon a clear showing that extant law is contrary to statutory principles, disruptive to industrial stability, or confusing." Levitz Furniture Company of the Pacific, Inc., 333 NLRB 717, 731 (2001) (Member Hurtgen concurring).

The Board should abide by the doctrine of stare decisis in the instant case. The Board's rule announced in Bethlehem Steel has been in effect for half a century and has provided stability

⁴¹ NABET's Exceptions, p. 4.

predictability, and certainty with respect to the negotiation, implementation, and termination of dues checkoff provisions. This stability, predictability, and certainty has been reinforced by numerous Board cases that have followed Bethlehem Steel during the past 50 years. See e.g. Hacienda, *supra*; Quality House, *supra*; and West Co., *supra*.

The value of stare decisis is not outweighed by other considerations. Bethlehem Steel is not contrary to other principles in the NLRA. Indeed, the NLRA's principles of economic independence, freedom of contract, and employee free choice all support the holding of Bethlehem Steel.

Changing the rule of Bethlehem Steel would be disruptive to industrial stability. If the Board were to hold that dues checkoff survives contract expiration, employers will stop agreeing to checkoff provisions. Every collective bargaining negotiation will become bogged down over this issue. In negotiations for a successor agreement, employers will be forced to propose eliminating checkoff to protect the ability to cease checkoff upon impasse in negotiations. The affected union will reject a proposal to delete checkoff resulting in a breakdown in negotiations solely over the checkoff issue. Having every negotiation collapse over dues checkoff cannot be an outcome desired by the Board, especially given that the Board cannot force an employer to agree to checkoff. See H.K. Porter, *supra*.

Finally, Bethlehem Steel is not confusing because the rule it announced is simple and unambiguous -- dues deduction clauses do not survive contract termination.

E. General Counsel's Requested Remedial Order Should Be Denied.

General Counsel readily acknowledges that "the precedent of Bethlehem Steel has been established law for nearly fifty years."⁴² Nevertheless, against this backdrop of well-settled and established law, General Counsel (1) requests that the changes in the law which it seeks be

⁴² General Counsel's Exceptions, p. 18.

retroactive in the application, and (2) requests the extraordinary remedy that WKYC-TV reimburse the Union for unpaid dues, not from employees as is the normal manner such monies are transmitted to the Union, but rather, from WKYC-TV's own funds. This requested remedy should be denied as it is contrary to established Board precedent as well as the Act itself.

General Counsel's request for retroactive application of its position overruling Bethlehem Steel should not be permitted as doing so would result in a "manifest injustice" against WKYC-TV. See Wal-Mart Stores, Inc., 351 NLRB 130, 134 (2007) (*quoting* SNE Enterprises, Inc., 344 NLRB 673 (2005)). In analyzing whether retroactive application of a change to established law will result in a "manifest injustice", the Board considers "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." Wal-Mart Stores, *supra*. In this case, in analyzing these factors, it is clear that WKYC-TV placed significant reliance on the Bethlehem Steel precedent in its decision to cease dues checkoff. WKYC-TV was well aware of the fifty year old precedent of Board law, a cornerstone of labor law upon which every practitioner is intimately familiar.

Retroactive application of a change in the law of dues checkoff (in non-right to work states) will also have an immensely negative impact on the Board's accomplishment of the purposes of the Act. As Board Members Liebman and Walsh stated in their dissent in Dana Corporation, "[t]he ultimate object of the National Labor Relations Act, as the Supreme Court has repeatedly stated, is 'industrial peace.'" 351 NLRB 434, 444, *overruled on other grounds*, (2007). In this regard, "[t]he Board seeks to maximize and balance two sometimes competing goals: 'preserving a free employee choice of bargaining representatives, and encouraging the collective-bargaining process.'" Dana Corporation, *supra*. In this case, to permit retroactive

application would only serve to disrupt and negatively impact the free choice of those employees who have elected to no longer support the Union financially.

Section 302(c)(4) of the Act permits an employer to deduct union membership dues from employees' wages and remit those monies to their exclusive collective-bargaining representative. 29 U.S.C. §186(c)(4). The Act does not provide for these monies to come from the Employer or any other party other than the employee. This provision is specifically designed to ensure that it is the employees, not the employer or union that is expressing their will with respect to representation. If retroactivity as proposed by General Counsel is allowed the will of all those employees who do not wish to financially support the Union is diminished if not fully undermined. Furthermore, General Counsel's request that WKYC-TV, not the employees themselves, pay the Union is in direct violation of the Act. Clearly, retroactive application of a position that violates the clear mandate of the Act does nothing to foster employee free choice and overall collective bargaining. See Nott Company, 345 NLRB 396, 401 (2005) ("Finally, although industrial stability is an important policy goal, it can be trumped by the statutory policy of employee free choice. That policy is *expressly* in the Act, and indeed lies at the heart of the Act.").

In analyzing the final consideration of whether WKYC-TV would suffer any "particular injustice" from retroactive application of a change to the precedent of Bethlehem Steel, as General Counsel proposes, the Board should not overlook or minimize the fact that to require WKYC-TV to pay employee dues from its own funds would effectively permit the Union and General Counsel to punish WKYC-TV for following Board law in effect at the time the conduct

occurred. Such a result would clearly be unjust.⁴³ “While the Act gives the Board broad discretion when it comes to fashioning remedies for unfair labor practices, the operative word is ‘remedies,’ and Board orders which are merely punitive in character will be struck down for that reason.” Miramar Hotel Corporation d/b/a Miramar Sheraton Hotel, 336 NLRB 1203, 1243 (2001) (citing Republic Steel Corporation, 311 U.S. 7, 11-12 (1940)).

General Counsel’s extraordinary request that WKYC-TV itself be required to pay the Union from its own funds is so beyond what Board precedent and statutory authority allow it should not only be considered improper, but a “manifest injustice” as well. In neither its brief to the ALJ nor in the Exceptions to the Board, does General Counsel cite any precedent in support of the position that WKYC-TV itself should be responsible for reimbursing the Union unpaid dues from employees with valid authorizations. Indeed, General Counsel’s suggestion that there is “ambiguity” as to who is responsible for paying lost dues is disingenuous. There is no ambiguity whatsoever with respect to how the Board interprets this issue. In Ogle Protection Services, Inc., 183 NLRB 682, 683 (1970), a case cited in General Counsel’s brief to the ALJ, the Board found that the employer would be required to reimburse the union for unpaid dues after unlawfully ceasing dues checkoff, *but*, that such monies would be “offset” against sums owed to employees from another unfair labor practice that resulted in lost wages and benefits. In Ogle, the Board, while addressing General Counsel’s request for a particular back pay calculation, specifically rejected the requested remedy in this case and stated, “that such a remedy would result in a windfall to some employees, who would now benefit from having their employer remit their accrued dues to the union, without ever having had these amounts deducted from their pay . . .” 183 NLRB at 683. Moreover, the ALJ in Ogle, whose analysis was adopted

⁴³ In Hacienda Hotel, Inc. (Hacienda III), 355 NLRB No. 154 (2010), Members Schaumber and Hayes, in their concurring opinion, stated “[t]he Respondent’s conduct was lawful under our clearly articulated precedent and imposing sanctions at this point would work a manifest injustice.”

by the Board stated, “[t]o require the Respondents to pay dues to the Union without reimbursement from the employees would appear to be in direct contravention of Section 302 of the Act which restricts payments to employee representatives to certain narrowly defined types of payment but aside from that consideration I do not believe that such an order is justifiable under the circumstances herein. If there is any one aspect of backpay that the courts have rendered ultimately clear it is that the employer may not be assessed a ‘punitive’ payment.” Ogle Protection Services, Inc., 183 NLRB 682, 690 (1970). In this case, to require WKYC-TV to pay dues from its own funds, when such monies were never collected from employees in the first place and at all times remained with the employees themselves, is overtly punitive and not allowed by the Act.

General Counsel cites two decisions that stand for the general proposition that an employer can be ordered to remit submitted but unpaid dues. These cases, however, do not stand for the proposition that such unremitted dues must be paid from an employer’s own funds. In YWCA of Western Massachusetts, 349 NLRB 762 (2007), and Plymouth Court, 341 NLRB 363 (2004), the Board found that the employers in both cases violated Section 8(a)(5) of the Act by either refusing to sign an already agreed upon contract or by illegally withdrawing recognition from the union. By contrast, in this case, there has been no finding of unlawful conduct on the part of WKYC-TV and, in fact, General Counsel has found that all of the negotiations conducted between WKYC-TV and the Union were conducted in good faith and that WKYC-TV lawfully reached a good faith bargaining impasse prior to the cessation of dues checkoff. Moreover, in

YWCA, the Board adopted the ALJ's remedial order requiring the employer to remit dues specifically in accordance with the "offset" holding of Ogle. 349 NLRB at 780.⁴⁴

General Counsel also ignores a 2010 decision in which the Board held that "[i]n order to remedy the Respondent's failure to deduct employee union dues as required by the agreement, we shall order the Respondent to deduct and remit union dues pursuant to valid checkoff authorizations." Bebley Enterprises, Inc., 356 NLRB No. 64 slip op. at 2 (2010)(emphasis added). In Bebley the Board found that the employer unlawfully repudiated the collective bargaining agreement and ceased dues checkoff. The Board's remedy reflects that it did not believe it was permissible to require an employer to pay money to the union from its own funds.

General Counsel's final argument in support of retroactive application is that WKYC-TV should have disregarded fifty years of Board precedent and recognized that the Board's odyssey in deciding dues checkoff cases in right to work states, somehow, "signaled" that, with respect to non-right to work states, the precedent of Bethlehem Steel was about to be changed. This argument, however, is clearly without merit. The Hacienda III decision did not put WKYC-TV on adequate notice that Bethlehem Steel was no longer good law. General Counsel's suggestion that WKYC-TV should have been guided, not by what the law actually was or as it stands today, but instead, be guided by the Board's dissenting opinions in the several Hacienda cases is contrary to both judicial and Board precedent. In San Manuel Indian Bingo and Casino, 341 NLRB 1055, 1061 (2004), a case that concerned the Board's jurisdiction of Indian tribes, the Board majority rejected the dissent's contention that it should be guided by Supreme Court precedent that, although not explicitly overruling a case the majority relied upon, should nevertheless be interpreted as if it had overruled the underlying case. In declining to do so, the

⁴⁴ "Respondent YWCA shall make whole its employees for losses, if any, which they may have suffered as a result of Respondent's failure to sign and honor the collective-bargaining agreement in the manner set forth in Ogle Protection Service, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971)."

Board stated, “the courts and thereby also the Board, are not free to disregard applicable precedent in favor of another suggested line of cases.” San Manuel, *supra*.⁴⁵

General Counsel also mistakenly relies upon Levitz Furniture Company of the Pacific, Inc., 333 NLRB 717 (2001). In Levitz, a case concerning the fifty year old legal standard regarding unilateral withdrawal of recognition as set forth in Celanese, the Board expressly declined to retroactively apply a new standard explaining that employers did not have “adequate warning” of a change in Board law. Levitz, 333 NLRB at 729. In this case, however, against the same backdrop of such longstanding and well established precedent, General Counsel erroneously suggests that a dismissal of a complaint because of the Board’s failure to obtain a majority opinion is sufficient to put employers on notice that fifty years of precedent is no longer the law of the land. With respect to retroactive application, there is simply no difference between the Celanese matter and the proposed change to Bethlehem Steel. Both cases set forth legal precedents that stood for nearly half a century and, as it did in Levitz, the Board should decline to retroactively apply any change in the law until employers and unions have been provided with sufficient notice.⁴⁶

Simply put, General Counsel’s requested remedial order for retroactive application to a change in the law of dues checkoff as well as requiring WKYC-TV to reimburse the Union from

⁴⁵ In San Manuel, the Board cites with approval the following decisions: Agostini v. Felton, 521 U.S. 203, 237 (1997)(“if a precedent of the Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions”), Shalala v. Illinois Council on Long Term Care, 529 U.S. 1, 18 (2000)(“This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*”), U.S. v. Rodriguez, 311 F.3d 435, 439 (1st Cir. 2002)(“implied overrulings are disfavored in the law.”)

⁴⁶ In the other cases cited by General Counsel none concerned longstanding established Board precedent as is the case in the current matter. Rather, in those cases, the laws at issue addressed unsettled precedent that had been overruled and/or seriously questioned by either the Board or higher courts on prior occasions. See Pattern & Model Makers Assoc., 310 NLRB 929, 931 (1993), Loehmann’s Plaza, 305 NLRB 663, 672 (1991).

its own funds should not be allowed. To do so would not only constitute a severe punishment far above any typical “make whole” remedy, it would clearly constitute a “manifest injustice.”

F. Evidentiary Objections.

WKYC-TV objects to Attachments 1 and 2 attached to General Counsel’s Exceptions and supporting brief. The attachments are inadmissible because they were not part of the stipulated record before the ALJ. The attachments are also inadmissible as hearsay. See FRE 801 et seq.

G. Request for Oral Argument.

Respondent WKYC-TV joins NABET’s request for oral argument in this matter pursuant to Section 102.46(i) of the Board’s Rules & Regulations.

CONCLUSION

For all the reasons discussed above, WKYC-TV respectfully requests that the Board adopt the ALJ's Decision dismissing the Complaint.

DATED: November 11, 2011

RESPONDENT WKYC-TV, INC.

By 

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RESPONDENT WKYC-TV, INC.

By 

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CERTIFICATE OF SERVICE

This is to certify that Respondent WKYC-TV, Inc.'s Answering Brief to Exceptions of General Counsel and Charging Party was filed with the Board's Office of the Executive Secretary and served on all parties by UPS Next Day Delivery, all costs pre-paid at McLean, Virginia and deposited with UPS on November 11, 2011.

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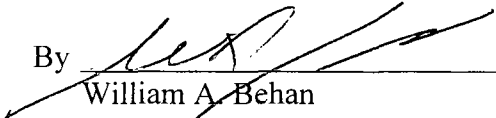
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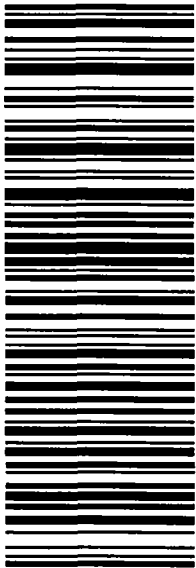

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